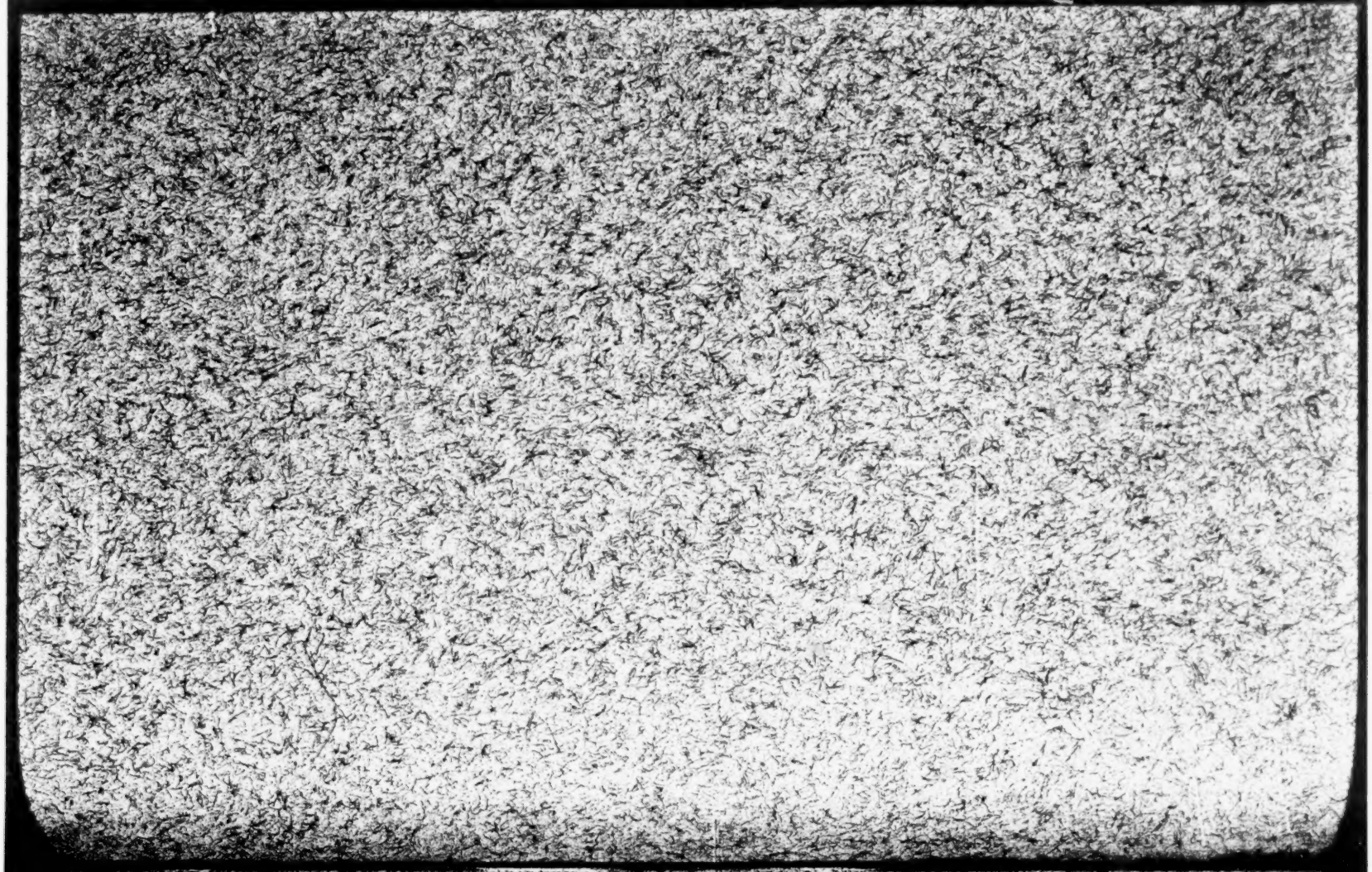

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CHARLES ELMORE CROP
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 154

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Petitioner,

vs.

E. E. JOHNSON, ADMINISTRATOR OF BENJAMIN F. COOKSEY, DECEASED,

Respondent.

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

This case comes here on a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit. The opinion of the lower court is reported in 70 F (2d) 41 (R-98).

I.

JURISDICTION.

(1) The date of the judgment to be reviewed is April 4, 1934 (R-106).

(2) The jurisdiction of this Court is invoked under Sec. 347a of the Judicial Code, and Supreme Court Rule 38 (5b).

(3) The case of *Bergholm v. Peoria Life Ins. Co.*, 284 U. S. 489, 52 S. Ct. 230; and *Egan v. New York Life Ins. Co.*, 67 F (2d) 899, are believed to sustain the jurisdiction of this Court.

II.

STATEMENT OF THE CASE.

On the 16th day of May, 1930, the petitioner issued its contract of insurance to Benjamin F. Cooksey for Forty-Five Hundred and 00/100 ($4500.00) Dollars. All premiums due in connection with said policy, up to and including the one due August 16, 1931, were paid, the premiums being payable quarterly. The contract of insurance contained the usual provisions of an ordinary life policy and also provisions for double indemnity for death by accident and total and permanent disability benefits. The original policy, which is not copied in the record, but under stipulation 7 (R-92) is certified as a part of the record.

This policy provides in Section 12 thereof (R-87):

> "If any premium be not paid before the end of the days of grace, then this policy shall immediately cease and become void, and all premiums previously paid shall be forfeited to the Company, except as provided in this policy."

The premium due on November 16, 1931, was never paid, and the policy, under the above provision, became void upon the expiration of the grace period.

Section 3 of the policy provides as follows (R-87):

"BENEFITS IN EVENT OF TOTAL AND PERMANENT DISABILITY BEFORE AGE 60.

"When Benefits Become Effective:

"If, before attaining the age of sixty years and while no premium on this policy is in default, the Insured shall furnish to the Company due proof that he is totally and permanently disabled, as defined above, the Company will grant the following benefits during the remaining lifetime of the Insured so long as such disability continues.

"Benefits (a) Increasing Income—The Company will pay a monthly income to the Insured of the amount stated on the front page hereof ($10.00 per $1,000.00 face amount of Policy) beginning upon receipt of due proof of such disability and increasing * * * * while total and permanent disability continues.

"(b) Waiver of Premiums—The Company will also, after receipt of such due proof, waive payment of each premium as it thereafter becomes due during such disability."

On or about December 14, 1931, which was during the grace period, the insured became totally and permanently disabled, and died on January 20, 1932. No proof of the disability suffered by the insured was furnished the Company, as required by the disability clause in the policy during the lifetime of the insured, and the first notice the Company received was proof of death made on January 27, 1932, after the death of the insured (R-33). The Company refused payment of the policy because the same had lapsed for non-payment of the November 16, 1931, premium, and respondent brought this suit (R-1). Upon a trial of the case the Judge of the District Court directed a verdict in favor of the petitioner (R-27-87) and respondent secured a reversal in the Circuit Court of Ap-

peals for the Fourth Circuit (R-98) upon the sole ground that the insured's mental or physical disability, which rendered it impossible for the insured to make proof under the disability clause of the policy, excused him from furnishing such proof before default in payment of the premium.

III.

Specification of Error.

The Circuit Court of Appeals for the Fourth Circuit erred in reversing the judgment of the District Court and in holding that the insured was excused from furnishing proof of his disability under the disability clause of the policy, if prior to default in payment of the premium he was mentally or physically incapable of furnishing the proof, instead of holding that the furnishing of proof of disability was a condition precedent to waiver of the premium, whether the insured be mentally capable or incapable.

IV.

Argument.

The sole question presented in this case is whether the mental or physical incapacity of the insured excused the failure to comply with an explicitly stipulated requirement of his life insurance policy to the effect that due proof of disability was a condition precedent to the waiver by the insurance company of the payment of premiums due on said policy.

The Circuit Court of Appeals for the Fourth Circuit in its decision of this case held that if the insured be sane, the furnishing of due proof is a condition precedent to the

waiver of premiums, but if he be insane or mentally incapacitated, then he is allowed a reasonable time thereafter to furnish proof—therefore a condition subsequent. The petitioner asserts that the disability clause under this policy in question is not open to this interpretation—that the condition relative to furnishing proof, regardless of the mental capacity of the insured, must be either a condition precedent or a condition subsequent. It cannot be both, since the policy is not ambiguous and not open to such construction. Under a proper construction of this policy, whether the insured be sane or insane, the Company is not bound to waive payment of premiums thereunder until the required proof of the disability is made in conformity to the provisions of said policy.

To entitle the insured to the disability benefits provided for by the policy, consisting of the waiver of premiums, the Company must *receive due proof that the insured has become totally and permanently disabled* within the intent and meaning of the policy.

The language of the policy makes receipt by the Company of proof of the disability a *condition precedent* to the waiver of payment of such premium as it *thereafter* becomes due during insured's said disability.

Peoria Life Ins. Co. v. *Bergholm,* 50 F (2d) 67 (Fifth Circuit Court of Appeals), affirmed in

Bergholm v. *Peoria Life Ins. Co.,* 284 U. S. 489, 52 S. Ct. 230.

Egan v. *New York Life Ins. Co.,* 67 F. (2d) 899 (Fifth Circuit Court of Appeals).

Smith v. *Missouri State Life Ins. Co.,* 134 Kan. 426; 7 P. (2d) 65.

Northwestern Mut. Life Ins. Co. v. *Dean,* 43 Ga. App. 67; 157 S. E. 878, Affirmed in *Dean* v. *Northwestern Mut. Life Ins. Co.* 175 Ga. 321, 165 S. E. 235.

New England Mut. Life Ins. Co. v. *Reynolds,* 217 Ala. 307, 116 So. 151.

New York Life Ins. Co. v. *Alexander,* 122 Miss. 813, 85 So. 93, Affirmed in *Berry* v. *Lamar Life Ins. Co.* (Miss. 1932) 142 So. 445.

Hall v. *Acacia Mut. Life Ins. Co.,* (Tenn.) 46 S. W. (2d) 56.

Western and Southern Life Ins. Co. v. *Smith.* 41 Ohio App. 197, 180 N. E. 749.

Courson v. *New York Life Ins. Co.,* 295 Pa. 518; 145 Atl. 530.

Iannaralli v. *Kansas City Life Ins. Co.* (W. Va.) 171 S. E. 748.

Reynolds v. *Traveler's Ins. Co.* (Wash.) 28 P. (2d) 310.

The provision of the policy in this case, making receipt by the Company of proof of disability a condition precedent to waiver of premiums, is free from ambiguity.

Bergholm v. *Peoria Life Ins. Co.,* 284 U. S. 489, 52 S. Ct. 230.

Contracts of insurance, like other contracts, must be construed according to the terms which the parties have used, to be taken and understood, in the absence of ambiguity, in their plain, ordinary and popular sense.

Bergholm v. *Peoria Life Ins. Co.,* 284 U. S. 489, 52 S. Ct. 230.

The condition in a policy of life insurance that the policy shall cease, if the stipulated premium is not paid on or before the day fixed, is of the very essence and substance of the contract, against which even a court of equity cannot grant relief. The same is true of a condition of a policy making the furnishing of proofs a condition precedent to the right to disability benefits.

Bergholm v. *Peoria Life Ins. Co.*, 284 U. S. 489, 52 S. Ct. 230.

Klein v. *New York Life Ins. Co.*, 104 U. S. 88, 26 L. Ed. 662.

New York Life Ins. Co. v. *Statham*, 93 U. S. 24, 23 L. Ed. 789.

To discharge the insured from the legal consequences of a failure to comply with an explicitly stipulated requirement of the policy, constituting a condition precedent to the granting of such relief by the insurer, would be to vary the plain terms of a contract, in utter disregard of long-settled principles.

Bergholm v. *Peoria Life Ins. Co.*, 284 U. S. 489, 52 S. Ct. 230.

Insanity does not excuse the payment of premiums when due.

Klein v. *New York Life Ins. Co.*, 104 U. S. 88, 26 L. Ed. 662.

New York Life Ins. Co. v. *Statham*, 93 U. S. 24, 23 L. Ed. 789.

If insanity does not excuse the payment of premiums when due, it should not excuse the furnishing of due proof to waiver of premiums in the event of disability.

New England Mut. Life Ins. Co. v. *Reynolds*, 217 Ala. 307, 116 So. 151.

Iannarelli v. *Kansas City Life Ins. Co.* (W. Va.) 171 S. E. 748.

Reynolds v. *Traveler's Ins. Co.* (Wash.) 28 P. (2d) 310.

Smith v. *Missouri State Life Ins. Co.*, 134 Kan. 426, 7 P. (2d) 65.

The fact that the insured was insane and therefore did not furnish proofs of disability, did not relieve the insured, or someone for him, from the duty of fulfilling the

condition precedent, namely, the furnishing of proof of disability, in order to obtain waiver of premiums falling due after receipt of such proofs.

Egan v. *New York Life Ins. Co.*, 67 F (2d) 899.

Iannarelli v. *Kansas City Life Ins. Co.* (W. Va.) 171 S. E. 748.

The Circuit Court of Appeals below has rested its holdings on the proposition that impossibility of performance may excuse the performance of a condition precedent if the existence of such condition *"is no material part of the exchange for the promisor's performance and the discharge of the promisor will operate as a forfeiture."* (Italics ours.) The holding that the furnishing of due proof of disability, as provided in the policy here involved, is no material part of the exchange for the performance of the promisor, to-wit, the waiver of premiums, contravenes the time-honored holding of this court that the condition in a policy of life insurance that the policy shall cease if the stipulated premium shall not be paid on or before the day fixed for payment is of the very essence and substance of a contract against which even a court of equity cannot grant relief.

Bergholm v. *Peoria Life Ins. Co.*, 284 U. S. 489, 52 S. Ct. 230.

Klein v. *New York Life Ins. Co.*, 104 U. S. 88, 26 L. Ed. 662.

New York Life Ins. Co. v. *Statham*, 93 U. S. 24, 23 L. Ed. 789.

The holding of the Circuit Court of Appeals here complained of, that "a mental or physical incapacity of the insured which rendered it impossible for him to make the proof" of disability, excused the legal consequence of failure to comply with (as stated in the opinion in the *Bergholm* case) "an explicitly stipulated requirement of

the policy" which constitutes a condition precedent to the waiver of the premium, ignores the established holding of this Court that, with respect to payment of insurance premiums, the doctrine that accident, inevitable necessity, or Act of God may excuse performance, has no existence.

Bergholm v. *Peoria Life Ins. Co.,* 284 U. S. 489, 52 S. Ct. 230.

Klein v. *New York Life Ins. Co.,* 104 U. S. 88, 26 L. Ed. 662.

New York Life Ins. Co. v. *Statham,* 93 U. S. 24, 23 L. Ed. 789.

Section 3 of the policy provides under what conditions the premium payments will be waived and benefits paid to the insured. When the conditions under this section have been fully complied with by the insured, then the Company agrees to waive payment of the premiums.

Giving the words contained in the policy their natural and ordinary meaning, as this Court did in the *Bergholm* case, it is clear that there is no ambiguity. The Circuit Court of Appeals below recognized this when it said:

> "The distinction thus pointed out, between the *Bergholm* and *Marshall* cases (Minnesota Life Ins. Co. v. Marshall, 29 F. (2d) (977) serves equally to differentiate the latter from the case at bar, for the language of the policy here is equally free from ambiguity, if indeed it is not more strongly in favor of the insurer than that in the *Bergholm* case. It is agreed that 'If * * * while no premium on this policy is in default, the insured *shall furnish to the Company due proof* that he is totally and permanently disabled * * * ' the company will ' * * * after receipt of such due proof, waive payment of each premium as it *thereafter* becomes due during such disability.' It could not be more plain that the furnishing of proof was intended to be a part of the condition precedent,

> or that the condition as a whole was in terms required to be performed before any premium should be in default. * * * The language of the provision here compels the conclusion that proof of disability must be furnished before default as a condition precedent to the waiver of premiums." (R-98, 101.)

The natural meaning of the language in this policy is that if the *insured will furnish due proof to the Company that he is totally and permanently disabled, the Company will, after receipt of such proof, waive each premium thereafter becoming due.* The condition is not "if the insured becomes disabled" but is "if the Company receives due proof" of the disability.

The policy of insurance in the *Bergholm* case and the instant one are practically identical, both providing for waiver of premiums upon receipt of proof of total and permanent disability while the policy is in force and all premiums due prior to the time of making proof paid.

Mr. Justice Sutherland, who delivered the opinion of the Court said:

> " * * * the obligation of the Company does not rest upon the existence of the disability; but it is the receipt by the Company of *proof* of the disability which is definitely made a condition precedent to an assumption by it of payment of the premium *becoming due after receipt of such proof.* The provision to that effect is wholly free from * * * * ambiguity."

And continuing:

> "This canon of construction is both reasonable and just, since the words of the policy are chosen by the insurance company; but it furnishes no warrant for avoiding hard consequences by imparting into a con-

> tract an ambiguity which otherwise would not exist, or under the guise of construction, by forcing from plain words unusual and unnatural meanings."

And again:

> "And to discharge the insured from the legal consequences of a failure to comply with an explicitly stipulated requirement of the policy, constituting a *condition precedent* to the granting of such relief by the insurer, would be to vary the plain terms of a contract in utter disregard of long-settled principles."

In the face of this decision it is hard to realize that the Court of Appeals below did "force from plain words unusual and unnatural meanings" and "imparted into the contract an ambiguity" which otherwise did not exist, by holding that the insured was excused from furnishing due proof to the Company of his disability, if he was mentally or physically incapable. And we contend that under the decision of the *Bergholm* case, this policy is not open to such construction, regardless of the mental capacity of the insured to furnish proof. Moreover the premiums to be waived are those becoming due *thereafter,* "commencing with the first premium due after approval of said due proof."

The identical policy now before this Court was construed in the same manner in the case of *Orr* v. *Mutual Life Ins. Co. of New York* (C. C. A. 8th) 64 F (2d) 561, citing with approval the *Bergholm* case.

In *Egan* v. *New York Life Ins. Co.* (C. C. A. 5th) 67 F (2d) 899, the insured was *insane,* and therefore mentally incapable of furnishing the proof. The policy was identical with the one at bar so far as the disability pro-

visions are concerned. In holding that insanity did not excuse the furnishing of proof, the Court said:

> "It is contended * * * that, since Egan was insane and unable to personally furnish proof of his disability, that condition of the policy was inoperative and waived. * * * * This contention is untenable. The policy is plain and unambiguous. The contract clearly contemplates that, if for any reason the insured is unable to promptly make proof of his disability, warranting the suspension of premiums and the payment of the annual installments, someone else in interest must do so for him. *This is a condition precedent necessary to be complied with to fix liability under the policy.* It is very material to the risk that proof of total disability be furnished promptly and while the policy is kept in force by payment of premiums. *The provisions of the policy so requiring are not to be considered waived or rendered inoperative simply because of misfortune overtaking the insured. Bergholm* v. *Peoria Life Ins. Co.*, 284 U. S. 489, 52 S. Ct. 230, 76 L. Ed. 416." (Italics ours.)

The decision of this case by the Court of Appeals below is in direct conflict with that of the Egan case, and with the following cases:

Iannarelli v. *Kansas City Life Ins. Co.* (W. Va. 1933) 171 S. E. 748, is a similar case. The insured became *insane* before the second premium became due and payable, and while so incapacitated the grace period expired and the policy lapsed. It was the contention of the insured's committee that inasmuch as the insured could not furnish the proof because of his disability, that under such circumstances proof could be furnished within a reasonable time thereafter; that the furnishing of such proof was a condition subsequent.

In answer the West Virginia Court said:

> "We are of opinion that, under the plain language of the policy in suit, proof of the disability was required to be furnished before the policy lapsed. This view is sustained by the holdings of many courts * * *. But we do think that the line of reasoning followed in the cases of this group is basically sound" (citing many cases, including *Bergholm* case).

In concurring in the opinion, Kenna, Judge, said:

> "By the terms of the policy, when a premium is due it must be paid or the policy contract lapses. This must be done * * * within the time specified. Then the disability clause contracts to waive payment of premiums under certain conditions. * * * Obviously, they must be paid or waived when due, else the policy is not kept alive. The company surely cannot be expected to keep the policy in effect unless the premium is paid or it is notified of disability so that it can waive the payment when the premium is due. When neither occurs at the time the premium is payable the policy lapses * * * . *The premium cannot be waived after it has become due and has defaulted. That would be to waive the effect of non-payment of premiums, whereas the provision is to waive payment.*" (Italics ours.)

Had there been no total disability clause in this policy, the non-payment of the November 16, 1931, premium would have terminated the rights of the insured under the policy.

In *Klein* v. *New York Life Ins. Co.,* 104 U. S. 88, 26 L. Ed. 662, this Court held that insanity or incapacitating sickness of the insured would not excuse payment of premiums when due. What effect, then, does the insertion

of the total disability clause have? In the *Iannarelli* case, supra, the Court said:

> "Its only purpose is to relieve the insured of the burden of paying premiums while he is under disability and not to place a monetary liability on the insurer * * * * For an additional premium the insured thereby undertook a definite thing, and it only. The undertaking is that upon *receipt of proof by the Company * * * and before default in payment of any subsequent premiums, and while the policy is in force * * * * he has become totally and permanently disabled, the Company will waive the payment of any subsequent premiums which mature during the continuance of the disability.*" (Italics ours.)

To the same effect is *Reynolds* v. *Traveler's Ins. Co.* (Wash. 1934) 28 P. (2d) 310, where the insured was likewise insane or mentally incapacitated to furnish proof. Very appropriately the Court said:

> "Now, if insanity does not excuse the failure to pay premiums, then there can be no good reason why it should excuse the failure to furnish proof of disability. It is proof of disability that excuses the failure to pay premiums. * * * Such disability includes insanity and other forms of mental incompetency. * * * We therefore must hold that the *incapacity of the insured furnishes no excuse for the failure to make due proof during the time that the policy was kept in force by payment of premiums.*" (Italics ours.)

Smith v. *Missouri State Life Ins. Co.,* 134 Kan. 426, 7 P. (2d) 65, is a similar case like that in the case at bar. Holding that insanity did not excuse the furnishing of proof, the Court said:

"Touching the contention that insanity should excuse the furnishing of proof, it will be noted that the law is well settled beyond any question that insanity does not excuse the payment of premium, and if it does not excuse the payment of premium, there is no good reason why it should excuse the failure to furnish proof of disability. On its face the rule may seem harsh, *but an examination into the basic principles of the insurance contract is convincing that it is sound, and reasonable.*" (Italics ours.)

There are many other cases to the same effect, all similar to the case at bar, and all holding that insanity does not excuse the failure to furnish proof of the disability. They are cited for the sake of brevity as follows:

Berry v. *Lamar Life Ins. Co.* (Miss.) 142 So. 445.

Bloss v. *Equitable Life Assur. Soc. of U. S.* (Wash.) 28 P. (2d) 303.

Courson v. *New York Life Ins. Co.,* 295 Pa. 518, 145 Atl. 530.

Hall v. *Acacia Mut. Life Ass'n.* (Tenn.) 46 S. W. (2d) 56.

New York Life Ins. Co. v. *Alexander,* 122 Miss. 813, 85 So. 93.

Dean v. *Northwestern Mut. Life Ins. Co.,* 43 Ga. App. 67, 157 S. E. 878, Affirmed in

Dean v. *Northwestern Mut. Life Ins. Co.,* 175 Ga. 321, 165 S. E. 235.

Yohalem v. *Columbian National Life Ins. Co.,* 244 N. Y. S. 666.

Yet the Court of Appeals below (R-98-103) said:

"It must be conceded that the position of the defendant *finds support in cases from two jurisdictions.*" (Italics ours.)

CONCLUSION.

The Circuit Court of Appeals for the Fourth Circuit erred in reversing the District Court by holding that insanity or mental or physical incapacity of the insured excused him from furnishing due proof of his total and permanent disability to the Company, in order to entitle him to waiver of premiums under the disability clause of the policy. Under the decision of this Court in the *Bergholm* case and the other cases cited by petitioner in this brief, we respectfully contend that the judgment of the Circuit Court of Appeals in this case should be reversed and judgment of the District Court affirmed.

Respectfully submitted,

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